Supreme Court, U.S.
FILED

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No.

IN THE

Supreme Court of the United States

CHARLES RUDD MACKENZIE,

Petitioner,

-v-

W. DENIS DONOVAN AND THE COMMUNITY PRESERVATION CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, SECOND JUDICIAL DEPARTMENT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the courts below violate the petitioner's right to due process by imposing criminal sanctions because of his inability to pay a civil debt?

2. Did the respondent Judge Donovan violate petitioner Mackenzie's constitutional rights by finding him guilty of criminal contempt in the absence of any evidence that petitioner's failure to pay a civil debt was due to willfulness, as opposed to inability?

3. Should the criminal contempt conviction be reversed because contrary to this Court's precedents, respondent Judge Donovan, despite demonstrated hostility to petitioner, heard the case instead of transferring it to a disinterested, unbiased judge?

4. Did the trial court deprive Mackenzie of the trial that due process of law requires for a criminal contempt conviction?

5. Did the respondent Judge Donovan violate Mackenzie's constitutional right against being compelled to testify against himself by using an order to show cause in a criminal contempt proceeding?

6. Did the respondent Judge Donovan violate Mackenzie's constitutional right to due process of law when he summarily found Mackenzie guilty of deceit within the meaning of New York Judiciary Law §487, without a hearing or trial, and imposed treble damages, despite material issues of fact?

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6 petitioner states that he has no parent companies or non-wholly-owned subsidiaries.

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I. Decision and Order of the Supreme Court of the State of New York, County of Westchester (Dated April 28, 2003 and entered May 1, 2003) . . . 39a

OPINIONS BELOW

The two opinions of the Supreme Court of the State of New York, Appellate Division, Second Judicial Department ("Appellate Division") (App., *infra*, 3a-5a and 30a-31a) are reported at 14 AD 3d 600, 788 NYS 2d 611 and 23 AD 3d 361, 804 NYS 2d 112 (2nd Dept. 2005). The opinions of the trial court (App. *infra*, 6a-25a, 32a-35a, 39a-44a) are unreported.

JURISDICTION

The Appellate Division's orders were entered on January 24, 2005 and November 7, 2005. (App., *infra*, 30a-31a, 3a-5a) A timely motion for leave to appeal to the New York Court of Appeals was denied as to both orders on January 17, 2006. (App., *infra*, 1a-2a). An earlier timely motion for leave on the first order had been dismissed on March 31, 2005 as not having finally determined the action within the meaning of the New York Constitution. (App., *infra*, 28a-29a). A timely motion for reargument of that dismissal was denied on June 16, 2005. (App., *infra*, 26a-27a). The jurisdiction of this Court is invoked under 28 U.S.C. 1257 (a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause of the Constitution provides in relevant part: "This Constitution, and the Laws of the United States *** shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI, cl.2.

The Fifth Amendment to the Constitution provides in relevant part: "No person ... shall be compelled in any criminal case to be a witness against himself..." The Sixth Amendment to the Constitution provides in relevant part: "In all criminal

prosecutions, the accused shall enjoy the right to a speedy and public trial..."

The Fourteenth Amendment to the Constitution provides in relevant part: "No state shall ... deprive any person of life, liberty, or property, without due process of law."

Section 487 of the New York Judiciary Law provides in relevant part:

> "§487. Misconduct by attorneys
> An attorney or counselor who:
> 1. Is guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party.***
> Is guilty of a misdemeanor, and in addition to the punishment prescribed therefor by the penal law, he forfeits to the party injured treble damages, to be recovered in a civil action."

Section 750 of the New York Judiciary Law provides in relevant part:

> "§750. Power of courts to punish for criminal contempts
> A. A court of record has power to punish for a criminal contempt, a person guilty of any of the following acts, and no others: ***
> 3. Wilful disobedience to its lawful mandate.***"

STATEMENT

A. The Criminal Contempt Conviction

In an April 28, 2003 decision and order (See appendix, *infra* 39a-44a), the trial judge, respondent W. Denis Donovan

("Donovan"), ordered the client of petitioner Charles Rudd Mackenzie ("Mackenzie") to restore the funds, received over one and one-half years earlier pursuant to Donovan's previous default judgment, to the Westchester County Treasurer in a mortgage foreclosure action (23-4).[1] Mackenzie had started the foreclosure action, his first, when he had been practicing law for a little more than three years (406).

Almost two months later, on June 18, 2003, the court called the attorneys into a conference in open court and on the record (636-42). During the conference, counsel for respondent The Community Preservation Corporation ("CPC") informed Donovan that Mackenzie had retained some of the surplus monies as attorney's fees. Mackenzie acknowledged this but explained that he no longer had the fees because he had paid income taxes and spent the money some time ago (646-8). On Thursday, June 19, 2003, the court ordered him to pay restitution in the amount of almost $80,000 to the county treasury by the next Monday at 10:00 AM (June 23, 2003) (649). It also ordered Mackenzie to deliver documentation concerning his fee that afternoon and to appear that Monday, or there would be a warrant for his arrest (655).

Mackenzie appeared as ordered on Monday and informed Donovan that he could not pay the $79,534.42 (662). He said that if he had the money he would pay it (663). Donovan, the trial judge, said that he was "fuming" as he read the papers because he "knew he had been taken" by Mackenzie and his clients (689). He stated that "somebody is going to go to jail for larceny someplace along the line, I think. However it's done. Somebody is in deep doo-doo." (693). Mackenzie had said that he would not risk his "career by disobeying intentionally an

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[1] The numbers in parentheses refer to pages of the record on appeal in the Appellate Division (Case No. 2003-09151)

order of this Court" (663), but suggested that the court adjourn the matter until July 31, 2003 when his client's mother would be back and that he and his client would be subject to an injunction as to any dissipation of funds (695-6). Donovan said that he had a "more efficient" way; rather than use the civil power of the court, he chose to issue a notice to Mackenzie that he was charged with willful disobedience of a lawful mandate of the court (697). He served Mackenzie with such a notice under New York Judiciary Law §750, §751, and orally ordered Mackenzie to show cause on July 10, 2003 why the court should not punish him for criminal contempt. He also orally ordered Mackenzie "to bring a toothbrush if you don't come up with an appropriate answer." (698).

On July 8, 2003, Mackenzie presented four checks totaling $27,451.08 and filed a comprehensive affidavit with exhibits showing his inability to pay the ordered restitution, stating that he had paid approximately $40,000 in income taxes for the year 2001 and most of the rest for bills, detailing his assets and income with bank statements of May and June, 2003, that he owned no real estate and stating that he had liquidated all his investments and savings and paid them to the County Treasury (609-634). He added that the fees in question had been disbursed to him on or about November 2, 2001, about one year and eight months earlier (610). He had liquidated all his assets except for one stock that would cost more to liquidate than what he would realize from the sale (611). His professional insurance carrier had denied coverage. He stated his intention to pay the remaining restitution from his future income. (612). He "respectfully" asked that based upon this disclosure, the court rule that he had not willfully disobeyed the court's order to return the entire amount and respectfully requested the Court to extend his time to pay the balance (613).

On July 10, 2003, the return date of the oral order to show cause (26-7), Donovan summarily found Mackenzie in criminal